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Nos. 18-1855, 18-1871

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In the  
UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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GARY B., et al,  
Plaintiffs-Appellants,

v.

GRETCHEN WHITMER, et al,  
Defendants-Appellees.

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Appeal from the United States District Court  
Eastern District of Michigan, Southern Division  
Honorable Stephen J. Murphy

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**BRIEF OF AMICUS CURIAE MICHIGAN ATTORNEY GENERAL  
DANA NESSEL IN SUPPORT OF PLAINTIFFS-APPELLANTS,  
IN SUPPORT OF REVERSAL**

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Dana Nessel  
Michigan Attorney General

Fadwa A. Hammoud (P74185)  
Solicitor General

Ann M. Sherman (P67762)  
Deputy Solicitor General  
Christopher M. Allen (P75329)  
Assistant Solicitor General  
Co-Counsel of Record  
Attorneys for Amicus Curiae  
P.O. Box 30212  
Lansing, MI 48909  
517-241-8403

Dated: June 7, 2019

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**STATEMENT OF INTEREST OF  
AMICUS CURIAE ATTORNEY GENERAL DANA NESSEL**

Amicus Curiae Dana Nessel is the Attorney General for the State of Michigan and is authorized to intervene and appear on behalf of the People of Michigan in any cause or matter in which the People may have an interest. Mich. Comp. Laws § 14.28; *Assoc. Builders & Contractors v. Perry*, 115 F.3d 386, 390–92 (6th Cir. 1997). This case and the issue whether the U.S. Constitution grants a fundamental right to a minimally adequate education are important to the People of Michigan, who reap the benefits of a better educated citizenry. Michigan—and the Nation as a whole—suffer a deficit when public education is available in name but substandard in quality.

This amicus curiae brief is being filed pursuant to Federal Rule of Appellate Procedure 29(a)(2). Attorney General Dana Nessel respectfully requests that this Court hold that the Constitution requires public schools to provide students with a minimally adequate education.



## INTRODUCTION AND SUMMARY OF ARGUMENT

Although the U.S. Supreme Court has not yet recognized a right to a public education, it left the door ajar with respect to the right to a minimally adequate education. The time has come to push that door wide open. In fact, it is long overdue. The Court can and should recognize the right to a minimally adequate education.

A minimally adequate education cannot be just a laudable goal—it must be a fundamental right. That is the only way to guarantee that students who are required to attend school will actually have a teacher, adequate educational materials, and a physical environment that does not subject them to filth, unsafe drinking water, and physical danger.

Granted, the right to a public education is not expressly mentioned in the Constitution, but neither are most of the rights we recognize as fundamental. The sparse constitutional text does not mention the right to marriage or the right to privacy, yet we have found our treasured document to embody these rights. As John Marshall said long ago, the Constitution was not meant to have the “properties of a legal code.” *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

Its nature, he explained, “requires that only its great outlines should be marked, its important objects designated. . . .” *Id.* at 407.

For decades, international law has recognized a basic human right to education. UNESCO’s Constitution, for example, states that there must be “full and equal opportunities for education for all.”<sup>1</sup>

Here at home our Nation’s Founders believed that the future of our American democracy depended on an educated citizenry. And a majority of states now recognize a fundamental right to education. This evolution is not surprising. Our country and the world have reached a point where citizens must either be minimally educated or flounder on both the home and world stages.

A minimally adequate education—one that includes appropriate content, sufficient materials, and a safe environment that does not stifle learning—is rooted in history and tradition and is implicit in the concept of ordered liberty. Indeed, it is a gateway to exercising other fundamental rights such as free-speech and association rights, the right to citizenship, and the right to travel. More than that, when education

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<sup>1</sup> UNESCO Constitution, Preamble,  
[http://www.unesco.org/education/pdf/UNESCO\\_E.PDF](http://www.unesco.org/education/pdf/UNESCO_E.PDF).

is inadequate yet compulsory, it violates parents' fundamental right to control the education of their children. And neither children nor adults can function in today's complex society without a minimally adequate education. Finally, a minimally adequate education is a necessary vehicle to repair decades of race discrimination and to empower individuals to rise above circumstances that have been foisted on them through no fault of their own. The government should not be able to infringe on this fundamental right unless it meets strict scrutiny.

John Marshall might well have been divining this issue when he said that the Constitution is "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." *McCulloch*, 17 U.S. at 415. In the places education is most needed—in cities such as Detroit—the crisis of education is here. And it can be solved by a Constitution that continues to be relevant as we grow and change as a society. As the Supreme Court recently explained, "Courts must exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2589 (2015). And "[w]hen new insight

reveals discord between the Constitution’s central protections and a received legal stricture, a claim to liberty must be addressed.” *Id.*

## ARGUMENT

### **I. A minimally adequate education is a fundamental right.**

Fundamental rights are those that are “deeply rooted in this Nation’s history and tradition,” and “implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed.” *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (cleaned up). The right to a state-provided minimum level of education meets these “guideposts,” *id.*, but even these guideposts do not set the “outer boundaries” of a fundamental right, *Obergefell*, 135 S. Ct. at 2598.

This Court can and should consider other guideposts, including the compulsory component of K-12 education, which in itself violates due process where the state mandates an “education” in name only. Another important consideration is that a minimally adequate education is necessary to function in today’s mobile, complex, and technological society. And finally, education is an essential vehicle to combat the results of decades of discrimination.

**A. The Supreme Court has repeatedly deferred the question whether a minimally adequate level of education is a fundamental right.**

The U.S. Supreme Court’s decision in *San Antonio Independent School District v. Rodriguez* is often quoted for its holding that, as a general matter, the right to education is not explicitly or implicitly protected by the Constitution. 411 U.S. 1, 35 (1973). But *Rodriguez* and later cases are significant for the issue they leave open—namely, whether a minimum level of education is a fundamental right. *See id.* at 36–37 (making clear that the case did not present the issue whether “some identifiable quantum of education is a constitutionally protected prerequisite” “for the enjoyment of the rights of speech and of full participation in the political process”); *Papasan v. Allain*, 478 U.S. 265, 285 (1986) (“[T]his Court has not yet definitively settled the question[ ] whether a minimally adequate education is a fundamental right . . . .”); *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 466 n. 1 (1988) (Marshall, J., dissenting) (“[T]his Court explicitly has left open the question whether such a deprivation of access [to a minimally adequate education] would violate a fundamental constitutional right.”).

Indeed, the *Rodriguez* decision plainly left open the possibility that an education system that creates “a class of ‘poor’ people” that is “absolutely precluded from receiving an education,” is constitutionally suspect. 411 U.S. at 25 n.60. Such a circumstance, the Court determined, “would present a far more compelling set of circumstances for judicial assistance than the case before us today.” *Id.* Plaintiffs in this case face just that set of circumstances, and this Court can and should recognize their fundamental right to a minimally adequate education.

**B. The importance of public education is deeply rooted in our Nation’s history.**

Our national commitment to a basic state-provided public education is not of recent vintage. It is “deeply rooted in this Nation’s history and tradition.” *Glucksberg*, 521 U.S. at 720–21. Indeed, it finds roots in the words of the Founders, grew broadly prior to enactment of the Fourteenth Amendment, and has flourished for over 100 years in our states’ universal requirements to attend school.

**1. Our Founders recognized that education was essential to the flourishing of our fledgling country.**

Our Founders often underscored the necessity of nationwide public education to the very survival of the republic. In his departing words to the Nation, our first president declared that the public's accumulation of knowledge is a necessary ingredient of a worthwhile democracy:

*Promote then, as an object of primary importance, institutions for the general diffusion of knowledge.* In proportion as the structure of a government gives force to public opinion, it is essential that public opinion should be enlightened.

George Washington, Farewell Address, Sept. 19, 1796 (emphasis added).

Thomas Jefferson likewise counseled that public education is necessary to the effective democratic bulwark against abusive government power:

I know no safe depository of the ultimate powers of the society, but the people themselves: and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is, not to take it from them, but to inform their discretion by education.

Thomas Jefferson, Letter to William Charles Jarvis, Sept. 28, 1820.

Jefferson not only advocated for a “system of general instruction, which

shall reach every description of our citizens, from the richest to the poorest,” but also saw it as his longest-running public concern. Thomas Jefferson, Letter to Joseph C. Cabell, Jan. 14, 1818.

John Adams shared Jefferson’s passion for universal education. He, too, believed that “[t]he education of a nation, instead of being confined to a few schools and universities for the instruction of the few, must become the national care and expense for the formation of many.” David McCullough, *John Adams* 364 (2001).

Although Noah Webster (known for his dictionary and for starting the first American newspaper) was not a Founding Father, he, like many of his esteemed peers, believed that education would spur development of “the principle[ ] of . . . liberty” and “inspire” ideas of what is “just,” and that these “systems of education” would instill in the youth “an inviolable attachment to their own country.” Noah Webster, *On the Education of Youth in America* (1787).

When these influential individuals and others vocalized their passion for widespread education, public education was not yet universal. But it expanded rapidly in subsequent centuries.



## 2. The idea of public schooling spread rapidly.

Colonial education was offered largely in the service of religion. *McCullum v. Bd. of Educ.*, 333 U.S. 203, 214 (1948) (opinion of (Frankfurter, J.). Over time that intermingling generally yielded to First Amendment concerns, eventually evolving into the secular, public school system of today. *Id.* That evolution, as Justice Frankfurter described it, “is the story of changing conceptions regarding the American democratic society, of the functions of State-maintained education in such a society, and of the role therein of the free exercise of religion by the people.” *Id.* But throughout its evolution, the broad goals of that education—preparation of the citizenry to participate in public life—have remained.

As early as the founding, “state constitutions signaled an early nationwide commitment to education,” with six of the thirteen states including education clauses in their constitutions. Friedman & Solow, *The Federal Right to an Adequate Education*, 81 Geo. Wash. L. Rev. 92, 116 (2013). Four of the initial thirteen states even directed their state legislatures to establish schools. *Id.*

But the nationwide expansion of public education was due largely to the efforts of the common schools movement in the early 19th century. *Id.* at 121–124. That movement signaled a rapid increase in the American public’s demand for education, and “enrollment spiked as trade and capitalism elevated the value of an education, even in the countryside.” *Id.* The common schools movement advocated for many of the foundational elements of the public school systems we know today, including the consolidation of schools into local or regional systems and their placement of schools under the direction of a statewide authority. *Id.* at 123. Significantly, the movement pushed not only for a longer school year and a more in-depth curriculum, but also for teacher professionalization, sufficient school resources, and a guarantee of free education to all children. *Id.* at 123–24; *see also Morse v. Frederick*, 551 U.S. 393, 411 (2007) (Thomas, J., concurring) (noting that “when States developed public education systems in the early 1800’s” they were intended “in part, as a way to educate those too poor to afford private school”) (internal citation omitted).

These goals were more broadly realized in the middle of the 19th century, when states recognized their duty to educate their citizenry.

At the time of the Fourteenth Amendment's ratification in 1868, 36 of the 37 states recognized a duty to provide a public-school education as a matter of state constitutional law. Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 Tex. L. Rev. 7, 108 (2008). By the 1880's, most state legislatures had taken action to centralize the administration infrastructure of public schools. Friedman & Solow, 81 Geo. Wash. L. Rev. at 125. For the past 100 years, *every* state has compelled children to attend school. *Id.* at 128. And the state constitutions from which those mandates emanate go beyond mere aspiration, often imposing duties on the state, detailing the ages of the children required to attend, and even requiring minimum levels of appropriation. *Id.* at 125–26; Education Commission of the States, *50-State Review: Constitutional Obligations for Public Education*, March, 2016.<sup>2</sup>

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<sup>2</sup> <https://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf>.

The long-running norm of compulsory public school education speaks volumes for its grounding in our country's history. By requiring all children to attend school for numerous of their formative years, the states have made education an utmost priority. *See Brown v. Topeka Bd. of Educ.*, 347 U.S. 483, 493 (1954) ("Compulsory school attendance laws . . . demonstrate our recognition of the importance of education to our democratic society.") Indeed, few bat an eye as the states compel millions of their citizens to leave their families and attend schools on a daily basis—perhaps the surest indication that the roots of education run deep.

**C. A minimally adequate public education is a necessary component of ordered liberty.**

The United States Supreme Court has applied the Fourteenth Amendment's due process clause to safeguard from the states those individual rights that have been "found to be implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

**1. The Supreme Court has repeatedly recognized that education is necessary to even the most elementary societal existence.**

The Supreme Court has often emphasized the importance of a sound education—and specifically, literacy—as a long-held prerequisite to many aspects of American life. *See Ambach v. Norwick*, 441 U.S. 68, 76 (1979) (“The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions.”) This recognition is not borne of high-minded rhetorical flourish; instead, it was developed early in our country’s understanding of the place of education in public life. Friedman & Solow, 81 Geo. Wash. L. Rev. at 123.

*Brown v. Topeka Board of Education*, 347 U.S. 483 (1954), is instrumental in understanding the role of education and its importance to the individual. *Brown* was a unanimous decision of the Court, and it recognized that “education is perhaps the most important function of state and local governments.” *Id.* at 493. *Brown* is not merely an historical artifact taught (to those who can read) in civics class. Its historic status stems in part from its recognition that education is a

centerpoint of civic life. The Court recognized that public schooling is “required in the performance of our most basic public responsibilities,” is “the very foundation of good citizenship,” and is the “principal instrument” in preparing children for civic, economic, and social participation in our society. *Id.* at 493; *see also McCollum*, 333 U.S. at 216 (opinion of Frankfurter, J.) (public schools are “[d]esigned to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people”).

Even before *Brown*, however, the Supreme Court recognized the importance of public education. Nearly 100 years ago, in *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Supreme Court struck down a statute outlawing the teaching of certain foreign languages. The Court did not mince words in observing that “[t]he American people have *always* regarded education and acquisition of knowledge as matters of *supreme importance* which should be diligently promoted.” *Id.* at 400 (emphasis added).

Later, in *Wisconsin v. Yoder*, the Court recognized that education equips individuals with the ability “to be self-reliant and self-sufficient participants in society,” crediting Thomas Jefferson’s belief that “some

degree of education” is essential to preserving freedom and independence. 406 U.S. 205, 221, 225 (1972).

More recently, in *Plyler v. Doe*, the Court reiterated its historical emphasis on the importance of education to individual children’s well-being and to the “maint[enance] [of] our basic institutions.” 457 U.S. 202, 221 (1982) (collecting cases). When a state denies to “a discrete group of innocent children” (in *Plyler*, undocumented immigrant children), the “free public education that it offers to other children,” the Constitution is offended. *Id.* at 230. The state’s refusal to provide even a basic education “create[s] and perpetuat[s] a subclass of illiterates,” *id.* at 230, who will not only suffer a “deprivation on their social[,] economic, intellectual, and psychological well-being,” *id.* at 222, but will “surely add[ ] to the problems and costs of unemployment, welfare, and crime,” *id.* at 230. The Court acknowledged that “education has a fundamental role in maintaining the fabric of our society.” *Id.* at 221.

The *Plyler* analysis is significant, because it does not simply recognize the “importance” of a basic education, which, standing alone, is insufficient to “determine whether it must be regarded as fundamental.” *Rodriguez*, 411 U.S. at 30. It goes further by

articulating essentially that some basic level of education is a constituent ingredient necessary to the existence of “liberty and justice.” *Glucksberg*, 521 U.S. 720–21.

**2. A minimally adequate education is a prerequisite to exercising other constitutional rights.**

A basic education is necessary to exercising other basic rights such as the right to free speech and association, the right to citizenship (including casting a meaningful vote), and the right to travel. Although the Supreme Court recognized this truth in *Rodriguez*, 411 U.S. at 36, it is much truer today than in 1973, given how quickly our society has evolved in complexity and technological sophistication.

For example, individuals without a minimally sufficient education cannot understand issues or gather and process information, and thus cannot meaningfully exercise their First Amendment free-speech and association rights. *See Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (recognizing that free-speech guarantees were intimately tied to the right to receive information and ideas). First Amendment rights further self-governance, aid the discovery of truth through the marketplace of ideas, promote autonomy, and foster tolerance. Erwin



Chemerinsky, *Constitutional Law* 751 (Aspen Law & Business, 1997).

But in our current information age, gathering and processing the necessary information to exercise First Amendment rights is increasingly more difficult—due, in part, to the sheer volume of available information.

The rights of citizenship (guaranteed by the Fourteenth Amendment) are also jeopardized by inadequate education. Without at least a minimally adequate education, individuals are unable to meaningfully participate in the American democratic process, whether it be the casting of a ballot or petitioning the government to effect change in the law. *See Plyler*, 457 U.S. at 234 (Blackmun, J., concurring) (“In a sense, then, denial of an education is the analogue of denial of the right to vote: the former relegates the individual to second-class social status; the latter places him at a permanent political disadvantage.”); *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 397 (2011) (“The right to petition is in some sense the source of other fundamental rights, for petitions have provided a vital means for citizens to request recognition of new rights and to assert existing rights against the sovereign.”) Voting is a key component of citizenship

and is “of the most fundamental significance under our constitutional structure.” *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (citation omitted). But meaningful exercise of the vote depends on understanding the issues of our times. Illiteracy makes it difficult to obtain information, evaluate it, and engage in rational decisionmaking. Illiterate individuals are deprived of the full benefits of the franchise. And the nation as a whole suffers when a portion of the electorate lacks the basic skills to vote wisely.

Likewise, individuals must have some ability to understand political and social issues in order to fully perform their civic duty on a jury. Mere physical presence might save one from issuance of a bench warrant, but it is a far cry from the ability to follow issues and think critically about how those should be resolved. Jury service is a high duty of citizenship, and juries are a critical component of our ability as a society to maintain the law and uphold justice.

Moreover, without a minimum competence in reading and writing, an individual cannot read the very laws that govern them—laws they are presumed to know. *See Cheek v. United States*, 498 U.S. 192, 199

(1991). Without education, the Constitution itself cannot be even minimally comprehended.

To a lesser degree, education also affects the right to travel. *See Williams v. Fears*, 179 U.S. 270, 274 (1900). For example, the inability to read street signs makes the exercise of the individual fundamental right to travel exceedingly difficult. The inability to understand and utilize modern navigational systems and the technological devices in which they are embedded also burdens the right to travel.

Again, the Supreme Court recognized the connection between education and other rights in *Rodriguez*, yet rejected these as support for finding a fundamental right to education because it did not “presume[ ] to possess either the ability or the authority to guarantee to the citizenry the *most* effective speech or the *most* informed electoral choice.” 411 U.S. at 36 (emphasis added). But what is asserted here is not the right to an education that might produce the best speech, the best vote, or the best-functioning citizen (although those are laudable goals for states in implementing their educational systems). It is only the right to the bare minimum of what will allow individuals to meaningfully exercise their constitutional rights.

Now, more than ever, the deprivation of minimally adequate education denies children “the ability to live within the structure of our civic institutions” and “foreclose[s] any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.” *Plyler*, 457 U.S. at 223. “Illiteracy is an enduring disability” that “will handicap the individual deprived of a basic education each and every day of his life.” *Id.* at 222.

**D. Other constitutional imperatives define the fundamental right to a minimally adequate education.**

When *Obergefell* explained that there is no precise formula for identifying and protecting fundamental rights and that the Court often addresses a liberty claim based on “new insight,” rather than being bound to history and tradition, 135 S. Ct. at 2598, it expanded what courts could consider in their inquiry. As the Court explained in the context of same-sex marriage, although marriage is “fundamental as a matter of history and tradition,” the content of that right rises “from a better informed understanding of how constitutional imperatives define liberty that remains urgent in our own era.” *Id.* at 2602.

That same breadth of inquiry is appropriate in determining whether the right to a minimally adequate education is a fundamental right.

**1. Absent a minimally sufficient education, forcing children to attend schools is a due-process violation.**

States cannot deliver an educational system that is inconsistent with the Constitution—one that limits parental control over their children’s education by mandating attendance, yet fails to deliver the basic tools for literacy and fails to provide a minimally healthy environment.

In a long line of cases beginning with *Meyer*, the Supreme Court has held that the liberty interest protected by the Due Process Clause includes parents’ right to “control the education of their own.” 262 U.S. at 401. *See also Pierce v. Society of Sisters*, 268 U.S. 510, 534–535 (1925) (holding that the “liberty of parents and guardians” includes the right to direct the “education of children under their control.”); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (explaining that it is the primary function and freedom of parents to prepare children “for the obligations the state can neither supply nor hinder”).

Later, in *Yoder*, the Court relied on a different ground, the Free Exercise Clause, in holding that Amish parents' right to homeschool their children and forgo one or two additional years of compulsory education outweighed the state's interest in a compulsory education. 406 U.S. at 234. The Court reiterated that the state's interest in universal compulsory education is not "absolute to the exclusion or subordination of all other interests." *Id.* at 215. And the Court also explained that the requirement of compulsory schooling to age 16 must be viewed as "provid[ing] opportunities to prepare [children] for a livelihood of a higher order than that which children could pursue without education and protect[ing] their health in adolescence." *Id.* at 228.

Inadequate schools do neither of these things. It is not at all clear that a child who is subjected to unqualified teachers and a lack of appropriate educational materials is being prepared for a livelihood of a higher order than that of a child who could stay at home reading books. Nor is it clear that a child or adolescent in a dirty, unsafe school is as healthy as one who remains home in a clean, safe environment.

In Detroit’s failing schools, the opportunity cost that the State of Michigan imposes is staggering: for over 6 hours per day, 180 days per year, for 10 years of their lives,<sup>3</sup> children are legally obligated to show up, even if the education is paltry or nonexistent and the environment dangerous.

**2. A minimally adequate education is necessary to function in today’s complex society.**

Today’s society is increasingly high-tech and mobile. Education orients individuals toward integration and utilization of these emerging skills and challenges. Conversely, a lack of education will keep many children—and later, adults—on the fringes.

Technology has dramatically changed our societal landscape, necessitating our need to change our educational landscape as well. Computers are now an integral part of daily life, as are smartphones. Indeed, Justice Kennedy, writing for the Court in *Packingham v. North Carolina*, described the cyber age as “a revolution of historic proportions,” the dimensions of which “we cannot appreciate yet,” noting that it has “vast potential to alter how we think, express

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<sup>3</sup> Mich. Comp. Laws §§ 380.1561, 388.1701(3)(a), (b).

ourselves, and define who we want to be.” 137 S. Ct. 1730, 1736 (2017). The Court also recognized that, for many, the internet is “the principle source[ ] for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge.” *Id.* at 1737. Finally, the Court characterized social networking sites such as Facebook, LinkedIn, and Twitter as “commonplace.” *Id.* at 1732.

But access to all these modern-day tools, which are integral to socialization, employment, and the processing of ideas and information, requires literacy and a minimally adequate education. The explosion of the internet as a daily fact of life and the development of computing technology make basic literacy even more essential to the basic accumulation of knowledge than when *Rodriguez* was decided. And although a smartphone can allow a person to connect to others across the neighborhood or around the globe, without a minimally adequate education it may as well be a paperweight.

Apart from the acquisition of skills themselves, the reality of modern life is that we are increasingly more mobile and more inter-



connected. States are not made up of isolated counties or cities, and the nation is not made up of isolated states. It is far more likely now than it was in 1973 when the Supreme Court decided *Rodriguez* that an individual who attended a poor-performing school in Detroit is likely to have to relocate, travel, or compete for jobs and share cyberspace with individuals in cities other than Detroit and in states other than Michigan. That individual might also sit on a jury and make a decision that impacts an individual, business, or government official outside of Detroit. Unfortunately, that same individual is likely to be at a decided disadvantage in all these arenas.

And it is not just the individual who will suffer. Beginning in the 1950's, we have worried that our Nation's schools are underperforming and are falling behind those of other nations. This fear has not abated, despite efforts such as the No Child Left Behind Act, which required states to set more rigorous evaluative and testing processes prior to gaining federal funds. To some degree these fears are borne out by recent statistics.

Nationwide studies reveal that in 2017 only 37% of our 4th grade students and only 36% of our 8th-grade students scored at or above

proficient in reading performance. U.S. Dep’t of Education National Center for Education Statistics, *The Condition of Education 2019*, p. xxiii.<sup>4</sup> Our math proficiency is not much better: Only 40% of 4th graders and 34% of 8th graders were considered proficient. *Id.*

International comparisons show that our literacy rates hover only around average and decline as students reach graduation. *Id.* at xxviii. In 2015 our Grade 4 mathematics scores were just slightly above the international average score, and our graduating seniors were at or below international averages in science, reading, and mathematics literacy *Id.* It is clear that the strength of our Nation depends on the fundamental right to a minimally adequate education.

**3. A minimally adequate education is a necessary vehicle to repair decades of racial discrimination.**

For decades, many elected officials, educators, and great minds have characterized education as “the civil rights issue of our generation.” Derek Black, *Unlocking the Power of State Constitutions with Equal Protection: The First Step Toward Education as a Federally*

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<sup>4</sup> <https://nces.ed.gov/programs/coe/>.

*Protected Right*, 51 William and Mary L. Rev. 1346, 1356 & n. 1 (2010) (citing various sources).

Recognizing a fundamental right to a minimally adequate education will protect those who are most at risk if their education is inadequate: those who have been the victims of decades of race discrimination. An adequate education has the power to provide these individuals with the tools necessary to lift them out of their circumstances, offering a realistic chance to attain socioeconomic, intellectual, and psychological well-being. *See Plyler*, 457 U.S. at 222.

Racism in the United States has existed since the colonial era, with privileges and rights granted to Whites but withheld from other races and minorities. History is replete with examples: slavery, segregation, internment camps, and immigration laws. Centuries of structural racial discrimination have relegated some to lesser opportunities and impoverished neighborhoods with poor schools. *See* Ta-Nehisi Coates, *The Case for Reparations*, *The Atlantic*, June 2014.<sup>5</sup>

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<sup>5</sup> <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/>.

Metro Detroit is no exception. In fact, it is a historical case-study on the effects of institutional racism. *See generally* Thomas J. Sugrue, *The Origins of the Urban Crisis: Race and Inequality in Postwar Detroit* (1996) (detailing the institutional racism affecting housing, employment, schooling, and poverty in metro Detroit). And as this case highlights, it has decades of problems with its schools.

Civil rights icon Judge Damon Keith, a product of Detroit schools who went on to serve for decades on this Court, fifty years ago wrote eloquently and powerfully about the evils of school segregation and inferior education in Southeast Michigan. “The right of all school children to obtain equal educational opportunity,” he said, “is one of ‘paramount importance’ and cannot be subordinated even to criteria of nearness, safety of access routes, or capacities of the schools.” *Davis v. Sch. Dist. of City of Pontiac, Inc.*, 309 F. Supp. 734, 744 (E.D. Mich. 1970), *aff’d*, 443 F.2d 573 (6th Cir. 1971) (quoting *Alexander v. Holmes County School Board*, 396 U.S. 19 (1969)). Judge Keith noted the devastating effect of Black children being given an inferior education in the Pontiac, Michigan school system, describing it as “permanent, devastating, irreparable harm—harm incapable of subsequent

correction,” and characterizing it as “psychologically damaging to [these children’s] self-image and economically damaging to their ability to perform in an adult world.” 309 F. Supp at 736.

Judge Keith also recognized the broader significance of this generational problem: “And so, we observe . . . *another generation* receiving inferior educations and being deprived of the technical and intellectual skills that will enable them upon graduation to perform in significant positions competently and confidently.” *Id.* at 736–37 (emphasis added). In attempting to “halt the furtherance of an abhorrent situation for which no one admits responsibility or wishes to accept the blame,” Judge Keith wisely stated that the blame “belongs to history” and that it was the Court’s duty to see what could “be done to correct the situation.” *Id.* at 737.

Judge Keith’s approach is consonant with that of our Supreme Court, which has stated that a law that “imposes substantial and unique burdens on racial minorities” is constitutionally untenable. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 471 (1982); *see also Johnson v. California*, 543 U.S. 499, 511–12 (2005) (“[S]earching judicial review . . . is necessary to guard against invidious

discrimination.”); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991) (“Racial discrimination” is “invidious in all contexts.”).

Two of the Supreme Court’s most important decisions on education concerned unconstitutional discrimination on the basis of status, and both recognize that an absence of education might be fatal to any meaningful opportunity to participate in American life. In *Brown*, the Court stated that “it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.” 347 U.S. at 493. And *Plyler* reiterated that this passage “still holds true,” noting the “inestimable toll” that a lack of access to education has on those who are so deprived. 457 U.S. at 222.

The lack of an adequate education is highly likely to keep these victims in the lowest socioeconomic class and bereft of opportunities. Children cannot reasonably be expected to succeed in life if denied an adequate education, especially those children with the compounding difficulties of racial discrimination and poverty. As long as they are denied an adequate education—because the school they are required to attend is in a low socioeconomic district—they will struggle to be emancipated from the cycle of poverty. Especially as technology

continues to evolve, an inadequate education leaves the poor and disenfranchised floundering, unable to access available opportunities (including higher education), unable to fully participate in our democratic society, and unable to emerge from poverty.

Educational statistics demonstrate the results of decades of racial discrimination, including decreased performance based on socioeconomic status. The generational lack of education begins to affect children in the earliest years of their lives, as the lack of education is perpetuated. In 2017, the percentage of 3- to 5-year-olds enrolled in preschool programs was higher for children whose parents' highest level of education was a graduate or professional degree (46%) or a bachelor's degree (47%) than for children whose parents' highest level of education was an associate degree (36%), some college but no degree (34%), a high school credential (33%), or less than a high school credential (26%). *The Condition of Education 2019*, at xxxi. Also in 2017, Blacks were almost 50% more likely than Whites to drop out of school, and Hispanics roughly twice as likely. *Id.* at xxiii.

These are just snapshots of the difficulties facing those with low socioeconomic status, and higher-education statistics show similar

patterns. Recently, the National Center for Education Statistics engaged in a longitudinal study to provide a new window into how the educational and economic outcomes of young adults relate to the socioeconomic status of their family of origin. *Id.* at 3. The number of individuals who were enrolled in postsecondary education seven years after being in ninth grade was a whopping 50 percentage points higher for those with high socioeconomic status (78%) than for their low-socioeconomic peers (28%). *Id.* In 2017–2018, only 2.18 million Blacks and 3.27 million Hispanics were enrolled in undergraduate institutions, as compared with 8.88 million Whites. *Id.* at xxv.

Employment statistics also illustrate that education matters to success in the workplace. In 2018, the employment rate was substantially higher for young adults with higher levels of educational attainment than for those with lower levels (86% with a bachelor's or higher degree as compared with 59% for those who had not completed high school). *Id.* at xxxvi.

Of course, there are many contributing factors to these and similar statistics linking low achievement with low socioeconomic status. Just last month a report from Georgetown University's Center



on Education and the Workforce noted that “[a]mong children with similarly high academic potential, the test scores of economically disadvantaged students are most likely to decline and stay low as they move through the K-12 system.” Anthony Carnevale, et al, *Born to Win To Win, Schooled to Lose—Why Equally Talented Students Don’t Get Equal Chances to Be All They Can Be*, The Georgetown University Center on Education and the Workforce, 2019, at 1.<sup>6</sup> To combat a variety of life circumstances, low socioeconomic individuals need at least an adequate—if not a stellar—education.

Education is a key tool in decreasing the social inequalities and closing the gaps that have resulted from decades of race discrimination. It helps individuals of all races and socioeconomic levels reach their full potential and prevents these groups from further marginalization and vulnerability. And it is necessary in tackling the root causes of discrimination, including intolerance, by fostering inclusion and acceptance of new ideas and cultural differences. As Helen Keller once said that “the highest result of education is tolerance.”

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<sup>6</sup> [https://1gyhoq479ufd3yna29x7ubjn-wpengine.netdna-ssl.com/wp-content/uploads/ES-Born\\_to\\_win-schooled\\_to\\_lose.pdf](https://1gyhoq479ufd3yna29x7ubjn-wpengine.netdna-ssl.com/wp-content/uploads/ES-Born_to_win-schooled_to_lose.pdf).

In sum, until our Nation recognizes education as a fundamental right, we will be living in the dark ages. Although there may continue to be gaps among various school districts, the promise of a minimally adequate education will at least give all schoolchildren a shot at success and all adults a chance to meaningfully participate in society. No one should be relegated to second-class citizenship because of race, poverty, or placement in an under-funded school district.

### **CONCLUSION AND RELIEF REQUESTED**

Now more than ever, a minimally adequate public education is critical in allowing every individual—no matter who they are or where they live—to exercise their constitutional rights, to respond to the complexities of modern life, and to rise above racial and socioeconomic barriers. And more broadly, the absence of a minimally adequate public education jeopardizes the very foundation on which our American democracy rests.

For the reasons stated above, Michigan Attorney General Dana Nessel respectfully requests that this Court recognize a fundamental right to a minimally adequate education.

Respectfully submitted,  
Dana Nessel  
Michigan Attorney General

Fadwa A. Hammoud (P74185)  
Solicitor General

/s/ Ann M. Sherman  
Ann M. Sherman (P67762)  
Deputy Solicitor General  
Christopher M. Allen (P75329)  
Assistant Solicitor General  
Co-Counsel of Record  
Attorneys for Amicus Curiae  
P.O. Box 30212, Lansing, MI 48909  
517-241-8403

Dated: June 7, 2019

## **CERTIFICATE OF COMPLIANCE**

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1. This amicus brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this amicus brief contains no more than 6,500 words. This document contains 6,492 words.

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/s/ Ann M. Sherman  
Ann M. Sherman (P67762)  
Deputy Solicitor General  
Co-Counsel of Record  
Attorneys for Amicus Curiae  
P.O. Box 30212, Lansing, MI  
48909  
517-241-8403

## **CERTIFICATE OF SERVICE**

I certify that on June 7, 2019, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

/s/ Ann M. Sherman  
Ann M. Sherman (P67762)  
Deputy Solicitor General  
Co-Counsel of Record  
Attorneys for Amicus Curiae  
P.O. Box 30212  
Lansing, MI 48909  
517-241-8403